Supreme Court, U.S.
FILED

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No. ____

In the Supreme Court of the United States

ALVIN PETERSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Eighth Circuit error in finding that the sufficiency of the evidence supported affirming the Petitioner's conviction for draining wetlands in violation of 16 U.S.C. §§ 668dd(c), (f)(2), when the evidence presented did not specifically identify which 314 acres spread across several sections on 1510.49 acres of Petitioner's property in Walsh County, North Dakota were encumbered wetlands pursuant to a 1966 easement.

LIST OF ALL PARTIES

Petitioner: Alvin Peterson

Respondent: United States of America

TABLE OF CONTENTS

Question Presented i

List of all Parties ii

Table of Authorities v

Petition for Writ of Certiorari 1

Opinions Below 1

Statement of Jurisdiction 1

Statutory Provisions at Issue 2

Statement of the Case 3

Reasons for Granting the Writ 5

I. Certiorari should be granted because there was not sufficient evidence for the Eighth Circuit to affirm Peterson's conviction for draining wetlands in violation of 16 U.S.C. §§ 668dd(c), (f)(2) ... 5

A. The Eighth Circuit erred in concluding there was substantial evidence that Peterson drained wetlands existing at the time of the 1966 easement 6

B. The Eighth Circuit misapplied its own standard under *Johansen* and *Schoenborn* and ignored this Court's decision in *North Dakota v.*

United States in determining that the United States satisfied its burden of proving Peterson drained identifiable, covered wetlands encumbered by the 1966 easement 10

II. Certiorari should be granted because there was not sufficient evidence for the Eighth Circuit to affirm that Peterson knew the scope of the 1966 easement ... 16

Conclusion 20

APPENDIX

A: Opinion (8th Cir. Jan. 27, 2011) 1a

B: Memorandum and Order (D.N.D. March 1, 2010) 11a

C: Memorandum and Opinion (D.N.D. November 12, 2008) 19a

D: 16 U.S.C. § 668dd(c), (f)(2) 36a

E: 1966 easement 38a

F: 1966 easement summary 43a

TABLE OF AUTHORITIES

Cases	Page
Jackson v. Virginia, 443 U.S. 307 (1979)	5, 9,10
North Dakota v. United States, 460 U.S. 300 (1983)	*passim*
Park v. United States, 286 F.Supp.2d 201 (D.P.R. 2003)	9
Perez v. Goose, 973 F.2d 630 (8th Cir. 1992)	5
Thompson v. Louisville, 362 U.S. 199 (1960)	10
United States v. Albrecht, 496 F.2d 906 (8th Cir. 1974)	11, 18
United States v. Barletta, 565 F.2d 985 (8th Cir. 1977)	5
United States v. Erhart, 415 F.3d 965 (8th Cir. 2005)	5
United States v. Johansen, 93 F.3d 459 (8th Cir. 1996)	*passim*
United States v. Peterson, 178 Fed. Appx. 615 (8th Cir. 2006)	19

United States v. Peterson,
632 F.3d 1038 (8th Cir. 2011) ..... *passim*

United States v. Schoenborn,
860 F.2d 1448 (8th Cir. 1988) ..... *passim*

United States v. Seest,
631 F.2d 107 (8th Cir. 1980) 11, 18

United States v. Welte,
635 F.Supp. 388 (D.N.D. 1982) 11, 18

Statutes

16 U.S.C. §§ 668dd(c), (f)(2) ..... *passim*

PETITION FOR WRIT OF CERTIORARI

Petitioner, Alvin Peterson, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The panel opinion of the Court of Appeals is published at 632 F.3d 1038 (8th Cir. 2011), and included in Petitioner's Appendix (Pet. App. at A). The opinion of the district court, *United States v. Peterson*, No. 2:08-mj-16 (D.N.D. March 1, 2010) affirming the magistrate judge's conviction of Peterson for violating 16 U.S.C. § 668dd(c) was not published, but is included in (Pet. App. at B). The Memorandum and Order of the United States Magistrate Judge is published at 2008 WL 4922413 (D.N.D. November 12, 2008) and included in (Pet. App. at C).

STATEMENT OF JURISDICTION

Peterson was charged with two counts of improperly draining wetlands subject to a United States Fish and Wildlife Service easement in violation of 16 U.S.C. §§ 668dd(c) and (f)(2). Jurisdiction in the trial court was based on 18 U.S.C. §§ 3231 and 3401, as Peterson was charged with a petty offense against the laws of the United States. The Magistrate found Peterson guilty on November 12, 2008, and Peterson timely appealed the Magistrate's decision to the United States District Court on June 11, 2009. The United States District Court for the District of North Dakota issued a

Memorandum Opinion and Order affirming the Magistrate's decision on March 1, 2010. Peterson timely filed an appeal to the Eighth Circuit Court of Appeals on March 5, 2010. On January 27, 2011, that court issued its decision affirming the judgment of the district court, holding substantial evidence supported Peterson's conviction. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AT ISSUE

The National Wildlife Refuge System Administration Act provides in pertinent part:

> (c) No person shall disturb, injure, cut, burn, remove, destroy, or possess any real or personal property of the United States, including natural growth, in any area of the System; ... unless such activities are performed by persons authorized to manage such area, or unless such activities are permitted either under subsection (d) of this section or by express provision of the law, proclamation, Executive order, or public land order establishing the area, or amendment thereof ...
>
> (f)(2) Any person who otherwise violates or fails to comply with any of the provisions of this Act (including a regulation issued under this Act) shall be fined under Title 18 or imprisoned not more than 180 days, or both.

16 U.S.C.A. §§ 668dd(c), (f)(2). (*See* Pet. App. at D).

STATEMENT OF THE CASE

Peterson was convicted of two class B misdemeanor violations of 16 U.S.C. §§ 668dd(c) and (f)(2) for unlawfully draining wetlands on his land in Walsh County, North Dakota subject to a federally encumbered United States Fish and Wildlife Service, ("FWS"), easement. The FWS easement at issue, the 1966 blanket easement, ("1966 easement"), was granted by Peterson's parents, Joe and Emma Peterson. (Pet. App. at E). *See also* *United States v. Peterson*, 632 F.3d 1038, 1040 (8th Cir. 2011). As recognized by the Eighth Circuit, like many easements negotiated by the FWS before 1976, the 1966 easement utilized a standard wetland conveyance document that included the entire tract of land in its legal description. *See id.*, at 1040.

The 1966 easement was accompanied by an easement summary that lumped in total acreage and wetland acreage from eight different parcels on seven different sections of Peterson's land. The eight different parcels constituted, in the aggregate, 1,510.49 acres. The easement summary asserted the 1966 easement covered 314 acres of wetlands within those 1,510.49 acres. (Pet. App. at F). The easement summary does not designate the specific parcels on Peterson's land containing any portion of the 314 acres of encumbered wetlands. There is absolutely no delineation in the 1966 easement of how many acres of encumbered wetlands were created on a particular parcel, or which wetlands on specific parcels or sections were subject to the 1966 easement.

In 1954, Alvin's father leased him the farmland that is subject to the 1966 easement, specifically, the west 1/2 of Section 15. Peterson's parents retained ownership until Peterson inherited the property in 1975. In the early 1970s, the United States began renegotiating parcel-wide easements, like the disputed 1966 easement, because parcel-wide easements were being deemed insufficient by some courts. (Pet. App. at C-1 at 3). In 1973, a representative from the FWS attempted to "renegotiate" the 1966 easement by designating certain wetlands on a map signed by Peterson. (Id.) Peterson did not own the land at this time, thus, as the Eighth Circuit recognized, he did not have legal authority to sign in his father's stead. *See* *Peterson*, 632 F.3d at 1041 n. 4.

In July 2007, Peterson hired a contractor to clean existing waterways on his land that were allegedly covered by the 1966 easement. As a result, FWS issued a violation notice and the magistrate convicted Peterson of draining wetlands in violation of 16 U.S.C. §§ 668dd(c) and (f)(2). *See* *United States v. Peterson*, 2008 WL 4922413 (D.N.D. November 12, 2008). The convictions were affirmed by the United States District Court for the District of North Dakota, *see* *United States v. Peterson*, No. 2:08-mj-16 (D.N.D. March 1, 2010), and the Eighth Circuit, *supra*.

REASONS FOR GRANTING CERTIORARI

I

CERTIORARI SHOULD BE GRANTED BECAUSE THERE WAS NOT SUFFICIENT EVIDENCE FOR THE EIGHTH CIRCUIT TO AFFIRM PETERSON'S CONVICTION FOR DRAINING WETLANDS IN VIOLATION OF 16 U.S.C. §§ 668dd(c), (f)(2)

In affirming Peterson's conviction for draining wetlands in violation of 16 U.S.C. § 668dd(c), (f)(2), the Eighth Circuit held that, "Because substantial evidence supports Peterson's conviction, we affirm." *Peterson*, 632 F.3d at 1040. This Court should grant certiorari because there was not sufficient evidence for the Eighth Circuit to affirm Peterson's conviction. As noted in *Perez v. Goose*, 973 F.2d 630 (8th Cir. 1992), "The federal constitutional standard for determining the sufficiency of the evidence was established in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The standard is whether, after assessing the evidence in the light most favorable to the prosecution, any rational fact-finder could have found the essential elements of the crime beyond a reasonable doubt." *Perez*, at 634.[1]

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[1] The same standard applies when the fact-finder is the court as opposed to a jury. "In passing upon the sufficiency of the evidence to sustain an ultimate finding of guilt following a bench trial, we apply the same standard of review that is applied where a defendant has been found guilty by a jury; that is to say, the finding must be sustained if it is supported by substantial evidence." *Peterson* at 1041 (citing *United States v. Erhart*, 415 F.3d 965, 969 (8th Cir. 2005)) (quoting *United States v. Barletta*, 565 F.2d 985, 991 (8th Cir. 1977)).

Even assessing the evidence in the light most favorable to the United States, no rational fact-finder could have found that Peterson drained wetlands in violation of 16 U.S.C. § 668dd(c), (f)(2) because the evidence relied upon by the Eighth Circuit in affirming Peterson's conviction did not establish an essential element of the crime – that Peterson drained identifiable, covered wetlands.

To establish Peterson drained wetlands in violation of 16 U.S.C. § 668dd(c), the United States must prove beyond a reasonable doubt that: (1) "identifiable, covered wetlands (as existing at the time of the easement's conveyance and described in the Easement Summary) were damaged," and (2) "that the defendant knew the parcel was subject to a federal easement." *See Peterson*, at 1041 (citing *United States v. Johansen*, 93 F.3d 459, 567 (8th Cir. 1996)). The United States failed to satisfy its burden in proving these elements, and the evidence relied upon by the Eighth Circuit in holding the United States proved beyond a reasonable doubt that Peterson drained "identifiable, covered wetlands" was insufficient.

A. The Eighth Circuit erred in concluding there was substantial evidence that Peterson drained wetlands existing at the time of the 1966 easement

The Eighth Circuit erred in concluding there was substantial evidence that Peterson drained wetlands existing at the time of the 1966 easement. The 1966 easement covered eight parcels on seven sections of land totaling 1,510.49 acres, but did not identify the specific 314 acres spread across the

1,510.49 acres that were subject to the 1966 easement. This lack of specificity was recognized by the Eighth Circuit. "Notably, the easement summary did not delineate how the wetlands acreage was distributed among each of the seven sections." *Peterson*, at 1040.

Notwithstanding this lack of specificity in the 1966 easement and easement summary in identifying which of Peterson's 314 acres were encumbered wetlands, the Eighth Circuit concluded there was substantial evidence that the wetlands Peterson drained were covered by the 1966 easement. In reaching this conclusion, the Eighth Circuit relied on an aerial photograph of the disputed wetlands taken in 1962, the 1973 map signed by Peterson before he was the fee simple owner of the property at issue in this case, [2] and the testimony of a FWS wildlife biologist.

> First, Peterson argues that the Government failed to show that the drained wetlands existed at the time of the easement's conveyance in 1966. We disagree. The Government introduced an aerial photograph of Section 15 taken in 1962, four years before the easement was conveyed. FWS wildlife biologist Mike Estey testified that the wetlands depicted in the 1962 aerial photograph were of the same approximate

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[2] As noted above, Peterson's parents, Joe and Emma Peterson, owned the land subject to the 1966 easement until 1975. Peterson inherited the land in 1975.

> size, shape, and location as the drained wetlands. Moreover, the wetlands depicted in the 1962 aerial photograph align closely with the wetlands depicted in the 1973 map. After reviewing the record, we conclude that the photographic evidence, maps, and expert testimony taken together amount to substantial evidence that the drained wetlands on Section 15 existed at the time of the easement's conveyance in 1966.

Peterson, at 1041. However, as the Eighth Circuit conceded several paragraphs later, the 1973 map is not relevant "to determine whether the drained wetlands were covered by the 1966 easement," *see id.*, at n. 4, because Peterson "did not have the authority to sign the 1973 renegotiated map." *Id.*

As a result, excluding the 1973 renegotiated map, by its own admission, *supra*, the only evidence the Eighth Circuit relied upon in concluding that Peterson drained "identifiable, covered wetlands" existing at the time of the conveyance of the 1966 easement was an aerial photograph taken in 1962, four years before the 1966 easement, and the testimony of an FWS wildlife biologist that the wetlands in the 1962 aerial photograph were of the same size, shape, and location as the drained wetlands. No reasonable fact-finder could have found the United States proved beyond a reasonable doubt that Peterson damaged the 314 acres of identifiable, covered wetlands as existing at the time of the 1966 easement and described in the Easement Summary by relying only on a 1962 aerial photograph and an FWS biologist's interpretation of that photograph.

In a comparable situation, the United States District Court for the District of Puerto Rico implied that relying on a single aerial photograph to identify wetlands subject to regulation by the Army Corps of Engineers, ("COE"), was not sufficient. In *Park v. United States*, 286 F.Supp.2d 201 (D.P.R. 2003), the court indicated that because the COE relied on more than a single aerial photograph in determining it had jurisdiction over certain wetlands, its jurisdictional determination was not arbitrary and capricious. "It is evident from the record, however, that the 1996 J.D. [jurisdictional determination] was not based solely on the 1985 aerial photograph. On March 12, 2003, prior to their use of the aerial photograph as an aid in determining the boundaries at issue, the Corps performed an on-site inspection of the area." *Id.*, at 206. "This site inspection led to a further revision of the wetland boundaries, and it was for that purpose that the 1985 aerial photograph was utilized." *Id.*, at 207. The implication in *Park* is that had the COE relied only on the 1985 aerial photograph in making its jurisdictional determination, and not done further inspection or taken other measures, the court would have found its decision arbitrary and capricious.

Similarly, the Eighth Circuit's characterization of an aerial photograph taken four years before the 1966 easement existed as sufficient evidence to convict Peterson is arbitrary and capricious. Not only is it arbitrary and capricious, to borrow language from the Court's decision in *Jackson v. Virginia*, *supra*, it is "constitutionally infirm." "[A] conviction based upon a record wholly devoid of any relevant evidence of a critical element

of the offense charged is constitutionally infirm." *Jackson*, at 314 (citing *Thompson v. Louisville*, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960)).

A single aerial photograph taken four years before the 1966 easement even existed, and a FWS biologist's interpretation of that photograph, is not sufficient evidence for the Eighth Circuit to affirm Peterson's conviction. The Eighth Circuit should have reversed and remanded with instructions to vacate the conviction, finding no reasonable fact-finder could have convicted Peterson based on that evidence. A picture may be worth 1,000 words, but in this case, not one of those 1,000 words in the 1962 aerial photograph spoke to which of Peterson's 1,510.49 acres were encumbered by the 1966 easement covering only 314 acres of wetlands.

B. The Eighth Circuit misapplied its own standard under *Johansen* and *Schoenborn* and ignored this Court's decision in *North Dakota v. United States* in determining that the United States satisfied its burden of proving Peterson drained identifiable, covered wetlands encumbered by the 1966 easement

As a result of misapplying its own standard under *United States v. Johansen*, *supra*, and *United States v. Schoenborn*, 860 F.2d 1448 (8th Cir. 1988), and this Court's decision in *North Dakota v. United States*, 460 U.S. 300, 103 S.Ct. 1095, 75 L.Ed.2d 77 (1983), the Eighth Circuit erred in holding that the United States met its burden in providing Peterson drained specific wetlands encumbered by the 1966 easement.

In *Johansen*, the United States made the same argument it offered in *Peterson*, that is, "that all wetlands found on an encumbered tract at any given time are covered by the easement and cannot be drained in any fashion." 93 F.3d at 463. *Cf. Peterson* at 1042 ("In contrast, the Government argues that the 1966 easement encumbers all wetlands existing in 1966 on the seven sections, including Section 15.") While this was the law in the 1980s, *see Johansen*, at 464, this "interpretation given the easements by this court was rejected by the Supreme Court." *Id*. [3] This Court rejected that approach in *North Dakota*, *supra*.

> As the easement agreements make clear, however, the restrictions apply only to wetland areas and not to the entire parcels. ... The fact that the easement agreements include descriptions of much larger parcels does not change the acreage of the wetlands over which the easements have been acquired.

Johansen, at 465 (quoting *North Dakota*, 460 U.S. at 311 n. 14). Despite this recognition in *North Dakota*, as applied by *Johansen*, that restrictions like 16 U.S.C. 668dd(c) apply only to those specifically identified wetland acres, the Eighth Circuit inexplicably reverted back to its case law as if the decisions in *North Dakota* and *Johansen* never

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[3] Such decisions include *United States v. Albrecht*, 496 F.2d 906 (8th Cir. 1974); *United States v. Seest*, 631 F.2d 107 (8th Cir. 1980); and *United States v. Welte*, 635 F.Supp. 388 (D.N.D. 1982). These cases, holding that all wetlands found on an encumbered tract are covered by the easement, were overruled in *Johansen*.

occurred. "[T]he Government can still prevail by proving that the easement encumbers *all* wetlands on the tract that were in existence at the time of the conveyance." *Peterson*, at 1042. This is not a correct statement of the law.

The holding in *Peterson*, and the Eighth Circuit affirming Peterson's conviction on the basis of the same, do not square with the rule of law stated in *North Dakota*, that, "The fact that the easement agreements include descriptions of much larger parcels does not change the acreage of the wetlands over which the easements have been acquired." This was made explicitly clear in *Johansen* when the Eighth Circuit stated, "Thus, the wetland easements' restrictions, as interpreted by the United States Attorney, would apply to the entire parcel. This was clearly and explicitly rejected by the Supreme Court in *North Dakota*."*Johansen*, at 466. The acreage encumbered by the 1966 easement is strictly limited to those 314 acres described in the easement summary. "Therefore, we hold that the federal wetland easements are limited to the acreage provided in the Easement Summaries." *Id*.

Therefore, under *North Dakota* and *Johansen*, for Peterson's conviction to have been affirmed, the Eighth Circuit should have required the United States to specifically identify which wetlands within Peterson's 1,510.49 acres were included in the 314 acres specifically encumbered by the 1966 easement. This comports with the *Schoenborn* standard adopted by the Eighth Circuit in *Johansen*. Taken from its own decision in *United States v. Schoenborn*, *supra*, the *Schoenborn* standard details what is required to identify what portions of wetlands spread across

several parcels are protected by a FWS easement. In *Johansen*, the Eighth Circuit explained the *Schoenborn* standard.

> Our decision in *United States v. Schoenborn*, 860 F.2d 1448 (8th Cir. 1988), reiterates this court's revised interpretation of the wetland easements. In that case, we reviewed the district court's finding that a Minnesota farmer had violated a wetland easement. Specifically, Schoenborn's violations consisted of draining four basins (as potholes are known in Minnesota) and filling nine ditches. **On review of each individual alleged violation, this court examined evidence that the specific potholes existed at the time of the easement conveyance, a clear departure from our prior practice focusing on any ditching of the burdened parcel, *cf. Albrecht*, 496 F.2d at 911, as well as the state of the basin at trial.** Thus, *Schoenborn* implicitly acknowledged the limited scope of the wetland easements.

Johansen, at 467 – 68 (emphasis added). The *Schoenborn* standard requires the United States to identify the specific potholes subject to a FWS easement, not merely to lump every pothole within the several parcels and conclude it is per se encumbered. *Cf. Schoenborn*, at 1453 – 1455 (the court examined the drained wetlands, ditch-by-ditch, pothole-by-pothole, in determining whether they were included as part of the FWS easement).

Nonetheless, in *Peterson* the Eighth Circuit discarded the ruling in *North Dakota* and the

Schoenborn standard for determining the scope of the 1966 easement and reverted to the old standard expressly rejected by this Court in *North Dakota*.

> Therefore, because the drained wetlands were in existence at the time of the conveyance, and because the 1966 easement covers all wetlands that were in existence at the time of the conveyance substantial evidence supports the district court's conclusion that the wetlands Peterson drained on Section 15 were covered by the easement – despite the easement's failure to include a contemporaneously-filed map or provide a section-by-section breakdown of the wetlands acreage.

Peterson, at 1043. *Cf. North Dakota* at 311 n. 14 ("[t]he fact that the easement agreements include descriptions of much larger parcels does not change the acreage of the wetlands over which the easements have been acquired.") As noted in *Johansen*, at 466, this sum of the whole acreage approach, negating the need for the United States to identify the specific wetland acres subject to the easement, was rejected by this Court in *North Dakota*. [4]

It is worth noting that the holding in *Peterson* and misapplication of *Johansen* by the Eighth

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[4] The Government's rationale, adopted by the Eighth Circuit in *Peterson*, makes for an absurd result. Even though the 1966 easement covers only 314 wetlands acres on Peterson's 1,510.49 acres, the Eighth Circuit's holding effectively grants the FWS an easement over the entire 1,510.49 acres.

Circuit may be due to an error in misquoting *Johansen*. Although the Eighth Circuit recognized the holding in *Johansen* as controlling, it misquoted a critical sentence from *Johansen* in reaching its decision. The Eighth Circuit quoted *Johansen* as stating,

> The Government does "not need to legally describe the confines of each covered wetland under the pre-1976 easements."

Peterson, at 1042 (quoting *Johansen*, at 467). However, this "quote" does not end after "under the pre-1976 easements." Instead, when read in its entirety, this quote stands for an entirely different proposition. The entire quote reads:

> In this context, our discussion is simply understood to mean that the government did **not need to legally describe the confines of each covered wetland under the pre-1976 easements** to ensure compliance with the gubernatorial consent limitation, a question already answered by the Supreme Court in *North Dakota*.

Johansen, at 467 (emphasis added). The bolded language shows what the Eight Circuit quoted, the underlined language shows what the Eighth Circuit mistakenly cut out. This case has nothing to do with the gubernatorial consent limitation. This erroneous language was a critical point of emphasis for the Eighth Circuit and may explain why the *Peterson* court was so willing to ignore the holding in *North Dakota* and throw out the *Schoenborn* standard that seemed to require the exact opposite, that is,

specifically identifying those wetland acres in the whole parcel encumbered by the 1966 easement.

Considering the foregoing, this Court's review is required to clarify the appropriate standard for identifying what specific wetland acres are encumbered by a FWS easement when those acres are distributed among several sections and do not constitute the entirety of the acreage within those sections. Further, this Court's review is required because there was not sufficient evidence for the Eighth Circuit to affirm Peterson's conviction for violating 16 U.S.C. §§ 668dd(c), (f)(2).

II

CERTIORARI SHOULD BE GRANTED BECAUSE THERE WAS NOT SUFFICIENT EVIDENCE FOR THE EIGHT CIRCUIT TO AFFIRM THAT PETERSON KNEW THE SCOPE OF THE 1966 EASEMENT

In affirming Peterson's conviction for draining wetlands in violation of 16 U.S.C. §§ 668dd(c), (f)(2), the Eighth Circuit held that, "[S]ubstantial evidence supports the conclusion that Peterson knew Section 15 was subject to a federal easement." *Peterson*, at 1043. This Court should grant certiorari because Peterson did not have notice as to which 314 acres on his 1,510.49 acres of property in Walsh County, North Dakota were encumbered by the 1966 easement. It is undisputed that the 1966 easement and easement summary failed to delineate how the 314 acres of encumbered wetlands were distributed among the 1,510.49 total acres across seven sections. As the Eighth Circuit explained, "Notably, the

easement summary did not delineate how the wetlands acreage was distributed among each of the seven sections." *Peterson*, at 1040.

If the 1966 easement and the easement summary did not delineate how the wetland acreage was distributed among each of the seven sections, how could Peterson have possibly known what 314 acres among his 1,510.49 acres were subject to the 1966 easement? The simple answer is that Peterson had no way of knowing what specific 314 acres were encumbered by the 1966 easement.

To establish Peterson drained wetlands in violation of 16 U.S.C. § 668dd(c), the United States must prove beyond a reasonable doubt that "that the defendant knew the parcel was subject to a federal easement." *Peterson*, at 1041 (citing *Johansen*, at 567). Until the FWS delineates the acres subject to the 1966 easement, Peterson has no way of knowing the scope of that easement. This is why, as recognized by *Johansen*, the FWS renegotiated the easements it entered into before 1976.

> This suit, as well as numerous other suits involving wetlands easements, arises in large part because prior to 1976, the FWS described wetland easements by referring to the entire tract of land rather than to the particular area of the covered wetlands. Since 1976, the FWS has recorded a map locating the covered wetlands acres as part of every easement document. However, as a consequence of the former practice and the fact that prairie potholes, by nature, are ill-defined and subject to fluctuation, there has been a considerable

> amount of confusion regarding what the earlier easements actually covered. *See e.g.*, *Albrecht*, 496 F.2d 906; *United States v. Seest*, 631 F.2d 107 (8th Cir. 1980); *United States v. Welte*, 635 F.Supp. 388 (D.N.D. 1982); *aff'd*, 696 F.2d 999 (8th Cir. 1982).

Johansen, at 463. Until such time when the FWS identifies the specific 314 acres encumbered by the 1966 easement, there cannot be sufficient evidence, and the United States cannot prove beyond a reasonable doubt, that Peterson knew the scope of the 1966 easement.

It is a red herring for the Eighth Circuit to affirm Peterson's conviction finding substantial evidence supported the fact Peterson had knowledge of the scope of the 1966 easement based on his involvement in "renegotiating" the 1973 map. The Eighth Circuit noted in its findings that it was Peterson's parents that conveyed the 1966 easement. *See Peterson*, at 1040. Peterson was not involved in negotiating the 1966 easement, and as such, his involvement with the 1973 map is irrelevant because it does not control what acres are covered by the 1966 easement. "We look only to the 1966 easement and easement summary, and not to the 1973 map, to determine whether the drained wetlands were covered by the 1966 easement. Although the Government occasionally refers to the 1973 map as a "renegotiation" of the 1966 easement, it conceded that the 1973 map did not change the terms and scope [of] the 1966 easement." *Peterson*, at 1041 n. 4.

Without the 1973 map, the only evidence relied upon by the Eighth Circuit in affirming

Peterson's conviction was Peterson's previous conviction in 2003 "involving the drainage of the very wetlands at issue in this prosecution, [which] provided sufficient notice that the parcel was subject to a federal easement." *Id.* (citing *Peterson I*, 178 Fed. Appx. 615 (8th Cir 2006)). [5] Again, this is a red herring because at no time has the United States delineated the extent of the 1966 easement. This was recognized in *Peterson*, when the Eighth Circuit noted – despite Peterson's previous conviction – "[T]he easement summary did not delineate how the wetlands acreage was distributed among each of the seven sections." *Peterson*, at 1040.

Moreover, the Eighth Circuit conveniently ignored that in *Peterson I*, it accepted the district court's reliance on the 1973 map – a map the Eighth Circuit itself now recognizes is not controlling. *See Peterson I*, at 617 ("We note in particular that, even if the 1966 easements and older materials left room for doubt, the 1973 map clearly demonstrates that the areas subject to Peterson's actions fall within the easements."). *Cf. Peterson*, at 1041 n. 4, *supra*.

As such, because Peterson's involvement in "renegotiating" the 1973 map is irrelevant and not determinative in defining the scope of the 1966 easement, and the other evidence relied on by the Eighth Circuit in affirming Peterson's conviction was his previous conviction based primarily on the same 1973 map, the Eighth Circuit erred in affirming substantial evidence supported the conclusion that

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[5] This decision is unrelated to the procedural history of this case.

Peterson had knowledge of the scope of the 1966 easement. He did not. Not even the FWS can define which of the 314 acres spread across 1,510. 49 acres on seven sections of land within Section 15 in Walsh County, North Dakota are subject to this 1966 easement.

CONCLUSION AND PRAYER

Petitioner respectfully requests this Court grant cert because there was not sufficient evidence for the Eighth Circuit to affirm his conviction for draining wetlands in violation of 16 U.S.C. §§ 668dd(c), (f)(2). At no point has the United States ever defined what specific 314 acres are "identifiable, covered" wetlands protected by the 1966 easement. Because of this lack of delineation by the United States, the Petitioner cannot reasonably be expected to know which of his 314 acres spread across seven sections of land covering 1,510.49 acres are encumbered. No reasonable fact-finder could have found that the United States proved beyond a reasonable doubt that Petitioner drained identifiable, covered wetlands as existing at the time of the 1966 easement's conveyance and described in the easement summary and that Petitioner knew the parcel was subject to a federal easement.

Respectfully Submitted,

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April 18, 2011

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 10-1557

UNITED STATES OF AMERICA - APPELLEE

v.

ALVIN PETERSON – APPELLANT

Appeal from the United States District Court for the District of North Dakota

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Filed: Jan. 27, 2011

Before: Chief Judge William J. Riley, and Michael J. Melloy and Raymond W. Gruender, Circuit Judges.

Opinion by Judge GRUENDER

GRUENDER, Circuit Judge.

Alvin Peterson ("Peterson") was charged with two Class B misdemeanor violations for draining wetlands on property encumbered by a federal wetlands easement, in violation of 16 U.S.C. § 668dd(c), (f)(2). The first violation-number W0900741-alleges Peterson drained wetlands 3, 5, and 8, subject to Walsh County Easement 124X-1-3, on the west 1/2 of Section 15, Township 156N, Range 59W ("Section 15"). The second violation-number W0900742-alleges Peterson drained wetland 2, subject to Walsh County Easement 56X-2, on the north 1/2, southeast 1/4 of Section 16, Township 156N, Range 59W ("Section 16"). A magistrate judge[1] found Peterson guilty of both violations, *United States v. Peterson,* 2008 WL 4922413 (D.N.D. Nov.12, 2008), and sentenced him to 5 years' probation and imposed a $10,000 fine and $1,500 in restitution. Peterson appealed to the district court, *see* Fed.R.Crim.P. 58(g)(2)(D), and the district court[2] affirmed, *United States v. Peterson,* No. 2:08-mj-16, (D.N.D. Mar. 1, 2010). On appeal to this court, Peterson challenges the sufficiency of the evidence solely for his conviction on violation number W0900741, the charge involving wetlands on Section 15. Because substantial evidence supports Peterson's conviction, we affirm.

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[1] The Honorable Alice R. Senechal, United States Magistrate Judge for the District of North Dakota

[2] The Honorable Ralph R. Erickson, Chief Judge, United States District Court for the District of North Dakota.

I. BACKGROUND

In 1966, Peterson's parents, Joe Peterson ("Joe") and Emma Peterson ("Emma"), conveyed a wetlands easement ("1966 easement") to the United States Fish and Wildlife Service ("FWS") in exchange for $4,700. As with many such easements negotiated by FWS before 1976, FWS utilized a standard wetland conveyance document that included the entire tract of land in its legal description. In this case, the 1966 easement purported to grant wetlands protection to FWS for the west 1/2 of Section 15 and for portions of six other sections of land. Although the 1966 easement refers to an attached map certified by the FWS Regional Director, no such map was ever located, if it did exist. However, included with the 1966 easement is an administrative easement summary that delineates the total "tract acreage" (1510.49 acres) and the "wetlands acreage" (314 acres) covered by the easement. Notably, the easement summary did not delineate how the wetlands acreage was distributed among each of the seven sections.

Joe leased the farmland on the west 1/2 of Section 15 to Peterson beginning in 1954. In 1973, after a series of disagreements with Peterson regarding the easement's coverage, FWS purported to "renegotiate" the 1966 easement with Peterson by having him execute, "for Joseph C. Peterson," a hand-drawn map of Section 15 that delineated the wetlands on the section covered by the easement ("1973 map"). Although Joe and Emma remained the owners of the land at the time, they did not sign the 1973 map, and they were not involved in its negotiation. Peterson inherited the west 1/2 of Section 15 in 1975.

In 1999, and again in 2003, Peterson constructed ditches to drain water from certain wetlands on Section 15. As a result, Peterson was convicted of draining protected wetlands, in violation of 16 U.S.C. § 668dd(c), (f)(2).[3] He was fined, sentenced to probation, and ordered to comply with a wetlands restoration program. Peterson appealed to this court, and we affirmed. *See United States v. Peterson,* 178 Fed. Appx. 615, 616 (8th Cir.2006) (unpublished per curiam) (" *Peterson I* ").

After the court-ordered restoration was completed in the fall of 2006, Peterson hired a contractor to remove the man-made earthen "plugs" installed during the restoration of wetlands 3, 5, and 8 on Section 15, resulting in more than an 87 percent reduction in water level. FWS issued a violation notice, and the magistrate judge again convicted Peterson of violating of 16 U.S.C. § 668dd(c), (f)(2), for draining wetlands on property encumbered by a federal wetlands easement. The district court affirmed, and this appeal followed.

II. DISCUSSION

On appeal, Peterson claims the Government's evidence was insufficient to prove that the drained wetlands on Section 15 existed at the time of the 1966 easement's conveyance, that the drained

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[3] The applicable statute provides that "[n]o person shall disturb, injure, cut, burn, remove, destroy, or possess any real or personal property of the United States, including natural growth, in any area of the [National Wildlife Refuge] System." 16 U.S.C. § 668dd(c).

wetlands are covered by the 1966 easement, and that Peterson had the requisite knowledge. He also argues that his actions amounted to a permissible clearing of natural waterways that had become overgrown and silted.

"In passing upon the sufficiency of the evidence to sustain an ultimate finding of guilt following a bench trial, we apply the same standard of review that is applied where a defendant has been found guilty by a jury; that is to say, the finding must be sustained if it is supported by substantial evidence." *United States v. Erhart,* 415 F.3d 965, 969 (8th Cir.2005) (quoting *United States v. Barletta,* 565 F.2d 985, 991 (8th Cir.1977)). "On review, we will consider the evidence in the light most favorable to the guilty verdict." *Id.* To convict Peterson of the violation, "the United States must prove beyond a reasonable doubt that identifiable, *covered* wetlands (as existing at the time of the easement's conveyance and described in the Easement Summary) were damaged and that the defendant knew that *the parcel* was subject to a federal easement." *United States v. Johansen,* 93 F.3d 459, 467 (8th Cir.1996) (emphasis and parenthesis in the original) (citing *United States v. Vesterso,* 828 F.2d 1234, 1244 (8th Cir.1987)).

First, Peterson argues that the Government failed to show that the drained wetlands existed at the time of the easement's conveyance in 1966. We disagree. The Government introduced an aerial photograph of Section 15 taken in 1962, four years before the easement was conveyed. FWS wildlife biologist Mike Estey testified that the wetlands depicted in the 1962 aerial photograph were of the same approximate size, shape, and location as the

drained wetlands. Moreover, the wetlands depicted in the 1962 aerial photograph align closely with the wetlands depicted in the 1973 map. After reviewing the record, we conclude that the photographic evidence, maps, and expert testimony taken together amount to substantial evidence that the drained wetlands on Section 15 existed at the time of the easement's conveyance in 1966.

Second, Peterson argues that the Government has failed to show that the specific wetlands he drained on Section 15 were covered by the 1966 easement. He asserts that the 1966 easement, which extends over the west 1/2 of Section 15 and six other sections of land, is "not specific enough to provide adequate notice and a legal encumbrance on Alvin Peterson's use of his land" because it lacks a contemporaneously-filed map or a section-by-section delineation of covered wetlands acreage. In the absence of a map or a section-by-section delineation of wetlands acreage, Peterson argues that the Government cannot prove which wetlands were included in the 314-acre total and which wetlands may not have been covered by the easement. The Government argues that "[t]he [drained] wetlands were 'now existing' in 1966, and therefore covered by the terms of the easement."[4]

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[4] We look only to the 1966 easement and easement summary, and not to the 1973 map, to determine whether the drained wetlands were covered by the 1966 easement. Although the Government occasionally refers to the 1973 map as a "renegotiation" of the 1966 easement, it conceded that the 1973 map did not change the terms and scope the 1966 easement: "[i]t ... does not make any difference whether [Alvin] Peterson

The Government does "not need to legally describe the confines of each covered wetland under the pre-1976 easements." *Johansen*, 93 F.3d at 467. However, because "federal wetland easements are limited to the acreage provided in the Easement Summaries," *id.* at 466, it is insufficient to show only that the drained wetlands were in existence at the time of the conveyance of the easement. Without the aid of a map filed with the easement or some other method of identifying the specific wetlands covered by the easement, however, the Government still can prevail by proving that the easement encumbers *all* wetlands on the tract that were in existence at the time of the conveyance.

Implicit within Peterson's argument, however, is the assertion that some wetlands acreage on the seven sections-including Section 15-was not covered by the 1966 easement. In contrast, the Government argues that the 1966 easement encumbers all wetlands existing in 1966 on the seven sections, including Section 15. The text of the 1966 easement supports the Government's argument. The easement prohibits "draining or permitting the draining, through the transfer of appurtenant water rights or otherwise, of *any surface water* including lakes, ponds, marshes, sloughs, swales, swamps, or

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did or did not have the authority to sign the 1973 renegotiated map. The easement was recorded in 1966 and the legal rights of the United States stem from the 1966 easement." To be sure, the 1973 map is evidence that Peterson knew that his property was encumbered by an easement, but this does not influence our inquiry into whether the drained wetlands actually were covered by the 1966 easement.

potholes, *now existing or reoccurring* due to natural causes on the above-described tract" (emphasis added). When the 1966 easement is read together with the easement summary, it is clear that the 1966 easement covers all wetlands then existing on the seven sections-including Section 15-and that those wetlands total 314 acres, as described in the easement summary.

The 1966 easement included an additional clause that could potentially exclude some wetlands: "Excepted are certain drainage ditches which the parties of the first part [Joe and Emma] may maintain and/or wetlands which are deleted from the provisions of this easement. The above exceptions are shown on a map certified by the Regional Director at the time of acceptance." The magistrate judge, however, noted that no such map was submitted in evidence and found that the record lacked any evidence to indicate that this clause served to exclude any wetlands in existence in 1966. *Peterson,* 2008 WL 4922413, at *2. Moreover, before the magistrate judge, Peterson's counsel characterized this provision as pertaining only to ditches, not wetlands: "it essentially says that if there are ditches or drainages that are maintained prior to 1966 they can continue being maintained." Likewise, Peterson does not argue in his briefs on appeal that this clause removed certain wetlands from the scope of the easement; his briefs mention this clause only within a discussion of Peterson's knowledge of the easement's scope. Therefore, Peterson has "waived his argument ... because the issue was not developed in his briefs as required." *Rotskoff v. Cooley,* 438 F.3d 852, 854 (8th Cir.2006). Even if we were to overlook this waiver, we find no evidence in the record that

refutes the magistrate judge's conclusions that this clause did not exclude any wetlands from the 1966 easement and that all wetlands on the seven sections in existence in 1966 were encumbered by the 1966 easement.

Therefore, because the drained wetlands were in existence at the time of the conveyance, and because the 1966 easement covers all wetlands that were in existence at the time of the conveyance, substantial evidence supports the district court's conclusion that the wetlands Peterson drained on Section 15 were covered by the easement-despite the easement's failure to include a contemporaneously-filed map or provide a section-by-section breakdown of the wetlands acreage.

Third, Peterson argues that the Government failed to show that he knew the scope of the 1966 easement. Peterson overstates the degree of knowledge required by our precedent: the Government need only prove that Peterson "knew that *the parcel* was subject to a federal easement." *Johansen,* 93 F.3d at 467. The 1973 map, signed by Peterson, clearly establishes that Peterson knew that Section 15 was subject to a federal easement. Even if we were to look past the 1973 map, Peterson's previous conviction involving the drainage of the very wetlands at issue in this prosecution provided sufficient notice that the parcel was subject to a federal easement. *See Peterson I,* 178 Fed.Appx. at 616. Accordingly, substantial evidence supports the conclusion that Peterson knew that Section 15 was subject to a federal easement.

Finally, Peterson argues that his actions amounted only to a permissible clearing of natural waterways that had become overgrown and filled with silt. We disagree, as the record evidence demonstrates that Peterson's work exceeded this description. The contractor hired by Peterson did not merely clean out ditches or natural waterways. At Peterson's direction, the contractor removed the man-made earthen plugs-installed as restorative measures required by his previous conviction-and breached the basins of wetlands 3, 5, and 8, resulting in at least an 87 percent reduction in water level. Accordingly, Peterson's argument is without merit.

III. CONCLUSION

For the foregoing reasons, we affirm Peterson's conviction.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NORTH DAKOTA
NORTHEASTERN DIVISION

No. 2:08-mj-16

UNITED STATES OF AMERICA – PLAINTIFF

v.

ALVIN PETERSON – DEFENDANT

Appeal from the United States District Court for the District of North Dakota

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Filed: March 1, 2010

Before: Chief Judge Ralph R. Erickson, District Judge

Opinion by Chief Judge Erickson

Defendant Alvin Peterson appeals from the Order entered on November 12, 2008, by Magistrate Judge Alice R. Senechal finding him guilty of improperly draining wetlands subject to a United States Fish and Wildlife Service (USFWS) easement. For the reasons that follow, the magistrate judge's decision is affirmed.

BACKGROUND

This is not the first time this Court has addressed Defendant Alvin Peterson's actions with regard to draining wetlands on his farmstead. In 2004, Peterson was charged in this Court with two counts of unauthorized use of the National Wildlife Refuge System, in violation of 16 U.S.C. §§ 668dd(c) & (f)(2). United States v. Peterson, Case No. 2:04-cr-102. The charges arose when Peterson drained wetlands covered by a USFWS easement. Peterson was found guilty of both counts after a bench trial. He was sentenced to probation, fined, and ordered to comply with a wetlands restoration plan. FN1

FN1 Peterson appealed the magistrate judge's decision to the district judge. The undersigned district judge affirmed. Peterson appealed to the Eighth Circuit. The Eighth Circuit affirmed in an unpublished decision. United States v. Peterson, No. 05-4248 (8th Cir. May 5, 2006).

Peterson repeatedly failed to comply with the restoration order. After multiple petitions and hearings, the Court authorized the United States to arrange for the restoration of the land and ordered Peterson to pay for the work as restitution. To ensure the safety of all personnel hired to restore the

wetlands, the Court ordered the United States Marshals Service to escort the contractor and employees on the land until the work was completed.

The work was completed in September 2006. In July 2007, Peterson hired a contractor to excavate the land, including removing dirt "plugs" that had been placed as part of the restorative work completed in the Fall. In August 2007, the USFWS cited Peterson. This time he was charged with draining three separate wetlands in Section 15 and one wetland in Section 16, in violation of 16 U.S.C. §§ 668dd(c) & (f)(2).

In November 2008, Magistrate Judge Alice R. Senechal presided over the trial. Peterson argued that he should be acquitted of the charges because the United States could not prove that the precise wetlands damaged were identifiable wetlands existing at the time the easement was granted, and that Peterson was within his rights to clean the waterways and drainage paths. The magistrate judge rejected Peterson's arguments. Peterson was found guilty of both misdemeanor violations and the wetlands were ordered to be restored once more. The restoration work cost the United States $7,274.30 (Doc. #59). FN2 Peterson now appeals from the magistrate judge's Order finding him guilty of the two misdemeanor violations.

FN2 The dispute regarding the amount of restitution that should be ordered remains pending before the magistrate judge. The United States initially estimated the work would cost $1,500.00, which the magistrate judge ordered Peterson to pay, but the United States spent $7,274.30 on the work and is

seeking a modification of the amount Peterson should pay.

DISCUSSION

The scope of the appeal from a magistrate judge's judgment of conviction is the same as it is in an appeal to the court of appeals from a district court's judgment of conviction. Fed. R. Crim. P. 58(g)(2)(D). A finding of guilt following a bench trial will be sustained on appeal if it is supported by substantial evidence. United States v. Erhart, 415 F.3d 965, 969 (8th Cir. 2005) (quoting United States v. Barletta, 565 F.2d 985, 991 (8th Cir. 1977)). The reviewing court views the evidence in the light most favorable to the verdict. Id.

The magistrate judge's memorandum and order contains a well-reasoned analysis supported by a thorough recitation of the relevant facts, so the Court will not belabor the point by going through all of the facts and analysis again. The discussion that follows hits the highlights.

In 1966, Peterson's parents granted a wetlands easement to the United States, covering certain portions of their farmland. Peterson's parents were compensated by the United States. Thus, the legal rights of the United States stem from the easement. See United States v. Vestero, 828 F.2d 1234, 1242 (8th Cir. 1987) (explaining that a recorded easement containing the existence of identifiable wetlands on a parcel is sufficient proof that the United States has a property interest in the wetlands on the parcel).

When the easement was granted, Peterson farmed the land and disagreed with his parents' decision to grant the easement. Since then, Peterson has battled with the United States Fish and Wildlife Service and repeatedly disregards Orders from this Court. The events giving rise to this case involve a blatant disregard of authority, in which Peterson hired a contractor to drain some of the very same wetlands that were restored only several months earlier.

Peterson argues the magistrate judge's finding of guilt is not supported by substantial evidence because the United States failed to prove beyond a reasonable doubt that the identifiable wetlands existed at the time the USFWS easements were conveyed to Peterson and that Peterson knew the scope of the USFWS easements. Neither of these arguments are persuasive.

Peterson has farmed the land on three of the four wetlands at issue since 1955, having rented it from his father before he inherited it. With regard to the wetland not inherited, Peterson purchased a parcel of land in Section 16 subject to a USFWS easement granted by a previous owner. At trial, the government presented a letter dated April 28, 2004, from the USFWS that explicitly advised Peterson that the wetland at issue was protected. The magistrate judge's decision that the wetlands damaged by Peterson on Section 16 are identifiable and Peterson knew the scope of the easement is supported by substantial evidence.

With regard to the remaining three wetlands, Peterson's parents granted the easement to the

United States in 1966. In 1973, maps were prepared and signed by Alvin Peterson clearly showing the wetlands on Section 15 that cannot be drained. The map states: "This map is drawn to clarify those wetlands covered by the easement." The three Section 15 wetlands at issue were restored in 2006 pursuant to an Order from this Court. There is no question that Peterson was aware of the easement and knew the scope of it, whether he agreed with it or not, when he hired a contractor to excavate the very same wetlands that had just been restored.

Peterson contends he was within his rights to drain the land because the 1973 "renegotiated" map of Section 15 is of no significance since he did not own the land at the time he signed it. There are avenues in which Peterson could have raised this issue to the Court before taking matters into his own hands and hiring a contractor to "undo" the work that was finished the previous Fall; however, he did not. In any event, Peterson cannot succeed on his argument.

In property, a merger occurs "when a greater and a lesser estate meet in the same person, and the lesser estate is said to merge into the greater estate." In re Estate of Flynn, 606 N.W.2d 104, 107 (N.D. 2000). Issues of merger are resolved by considering the parties' intent and "the interests of substantial justice." Id. Quite clearly, the United States and Peterson intended to resolve their disputes about the scope of the USFWS easements granted by Peterson's parents when Peterson signed the 1973 "renegotiated" map. While Peterson may have been only a tenant on the land at the time, he has since become the owner of the land. Under the law, his

interest as a tenant merged with that of owner and defeats his claim that his signature more than 30 years ago should now be considered invalid.

Moreover, Peterson contended in the 2005 case that the government failed to prove beyond a reasonable doubt that the wetlands he damaged were in existence prior to, and therefore subject to, the 1966 easements. The Eighth Circuit noted:

> The admissions, testimony, maps, and photographic evidence provide more than adequate support for the district court's ruling as to the extent of the easements. We note in particular that, even if the 1966 easements and older materials left room for doubt, the 1973 map clearly demonstrates that the areas subject to Peterson's actions fall within the easements.

United States v. Peterson, No. 05-4248 (8th Cir. May 5, 2006) (unpublished). Peterson disputes the application of collateral estoppel in a criminal case. However, the rule of collateral estoppels may be applied in criminal cases. United States v. Torres-Villalobos, 487 F.3d 607, 617 (8th Cir. 2007), quoting Hernandez-Uribe v. United States, 515 F.2d 20, 22 (8th Cir. 1975) (collateral estoppel may be applied in appropriate circumstances in criminal cases if approached with "realism and rationality"); United States v. Wells, 347 F.3d 280, 285 (8th Cir. 2003) (applying collateral estoppel in the context of double jeopardy).

Despite the doctrine, the magistrate judge permitted Peterson to offer testimony and present

his defenses. Resolution of Peterson's arguments does not hinge on the doctrine of collateral estoppel. It merely highlights Peterson's defiance and outright refusal to accept this Court's (and the Eighth Circuit's) interpretation of the United States' easement rights on the land. Substantial evidence was presented at trial, which supports the magistrate judge's decision.

This Court finds that the United States proved, beyond a reasonable doubt, that identifiable, covered wetlands were damaged by Peterson, that the USFWS easement is valid, and that Peterson knew the wetlands were subject to a valid federal easement. The Court is wholly unpersuaded that Peterson's conviction is "repugnant to the notions of justice and fair notice."

DECISION

The magistrate judge's Order filed on November 12, 2008 is **AFFIRMED** in its entirety.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

No. 2:08-mj-16

UNITED STATES OF AMERICA

v.

ALVIN PETERSON

Filed: Nov. 12, 2008

Before: Alice R. Senechal, United States Magistrate Judge

Opinion by Magistrate Judge Senechal

MEMORANDUM AND ORDER

SENECHAL, United States Magistrate Judge:

Alvin Peterson (Peterson) is charged with two Class B misdemeanor violations of 16 U.S.C. § 668dd(c) and (f)(2). Both charges allege improper drainage of wetlands subject to a United States Fish and Wildlife Service (FWS) easement. One charge concerns three separate wetlands in Section 15 and the other charge concerns one wetland in Section 16. The case was tried to the Court July 14 and 15, 2008. Counsel submitted written post-trial summations, the last of which was filed September 26, 2008. The Court has considered the evidence presented at trial, and the briefs of the parties, and issues the following decision.

To prove the charges, the United States must establish each of the following elements as to each charge by proof beyond a reasonable doubt: 1) that the United States holds a property interest, established through a properly recorded and accepted easement, 2) that identifiable wetlands existed at the time the easement was taken, 3) that Peterson knew that the wetlands at issue were subject to an easement, 4) that Peterson engaged in prohibited activity by disturbing, injuring, cutting, burning, removing, or destroying the wetlands at issue, 5) that the activity was not permitted or otherwise authorized, and 6) that Peterson's actions caused surface and/or subsurface damage which injured, disturbed, or destroyed the wetlands. *United States v. Johansen,* 93 F.3d at 467, (8th Cir.1996). Peterson alleges that the government did not meet its burden of proof on any of the six elements of

either charge. This Court finds that the government met its burden as to all elements of both charges.

Section 15-156-59 (Violation Notice No. 0900741)-Easement Establishment, Identifiable Wetlands, and Peterson's Knowledge of Easement

North Dakota lies within the prairie pothole region. The prairie pothole region has many small wetlands that provide excellent breeding and nesting grounds for waterfowl. The United States has purchased easements from many North Dakota landowners; the easements prohibit landowners from draining wetlands or otherwise destroying the wetlands' suitability as waterfowl breeding and nesting grounds. *See generally, North Dakota v. United States*, 460 U.S. 300 (1983).

Peterson inherited the W 1/2, Section 15-156-59, from his father, Joe C. Peterson, subject to an FWS easement (Gov.Ex.5). On November 10, 1966, Peterson's father, together with his wife Emma Peterson, signed a conveyance of an easement to the United States for waterfowl management rights on Section 15, as well as on other farmland they owned. (Gov.Ex.1). The United States accepted the easement on January 16, 1967, and paid $4,700 for the easement rights. (Gov. Exs. 2 and 3). There is no question the United States holds a properly recorded and accepted easement on Section 15.

The easement, designated Walsh County Easement 124X, 1-3 (Gov.Ex.1) provides:

The parties of the first part [Joe C. Peterson and Emma Peterson], for themselves and for their heirs,

successors and assigns, covenant and agree that they will cooperate in the maintenance of the aforesaid lands as a waterfowl production area by not draining or permitting the draining, through the transfer of appurtenant water rights or otherwise, of any surface water including lakes, ponds, marshes, sloughs, swales, swamps, or potholes, now existing or reoccurring due to natural causes on the above-described tract, by ditching or any other means; by not filling in with earth or any other material or leveling, any part or portion of the above-described tract on which surface water or marsh vegetation is now existing or hereafter reoccurs due to natural causes; and by not burning any areas covered with marsh vegetation. It is understood and agreed that this indenture imposes no other obligations or restrictions upon the parties of the first part and that neither they nor their successors, assigns, lessees, or any other person or party claiming under them shall in any way be restricted from carrying on farming practices such as grazing, hay cutting, plowing, working, and cropping wetlands when the same are dry of natural causes, and that they may utilize all of the subject lands in the customary manner except for the draining, filling, leveling, and burning provisions mentioned above.

Excepted are certain drainage ditches which the parties of the first part may maintain and/or wetlands which are deleted from the provisions of this easement. The above exceptions are shown on a map certified by the Regional Director at the time of acceptance. [FN1]

FN1. The second paragraph quoted above is not a part of the standard form in use at the time, but was added to the Section 15 easement.

No "map certified by the Regional Director at the time of acceptance" is in evidence. An Easement Summary, Gov. Ex. 4, lists total tract acreage of 1510.49 acres (in seven different sections of land), which includes 314.00 total wetland acres.

Peterson testified that he had farmed the W 1/2 of Section 15 since 1955, having rented it from his father before he inherited it. Section 15 includes three of the four wetlands at issue in this case; they are designated as Wetlands 3, 5, and 8. From the outset, Peterson and FWS had disagreements about drainage in Section 15.

Peterson had constructed some drains on Section 15 before his father granted the easement, and there were disputes with FWS about what wetlands Peterson could drain without violating terms of the easement. In 1973, FWS employees met with Peterson, and a map of the Section 15 wetlands was drawn as a result of that meeting. (Gov. Ex. 13 and Def. Ex. 1). That document states, "This map is drawn to clarify those wetlands covered by the easement." Both parties refer to the document as a "renegotiation." A memo to the file, dated September 27, 1973, includes the following statement by an FWS employee about the map:

Maps were prepared and signed by Alvin Peterson and myself that show what wetlands on the entire easement can *not* be drained. In essence just check to see he hasn't drained these. There are so many

approved ditches that it's impossible to field check. Just check to see that the wetlands he can't drain as shown on the maps, aren't drained.

(Gov.Ex.14). A former FWS employee who was involved in the 1973 meeting testified that "renegotiation" was done in part in response to court decisions calling the government's easement interests into question. As a result of the 1973 "renegotiation," FWS reduced its wetlands acreage on the 1966 easement by approximately 15 acres from the original 314.00 acres. (*Id.*).

The three Section 15 wetlands involved in this case are clearly illustrated on the 1973 map. Evidence about the 1973 map, however, was disputed. Former FWS employees testified that it was prepared in Peterson's presence; Peterson testified that the copy of the map which was mailed to him after the meeting included wetlands that had not been drawn on the map while he was present. The copy of the map that was received as Government's Exhibit 13 has a paragraph crossed out, and also has the notation "N.A." regarding that paragraph. The copy of the map which was received as Defendant's Exhibit 1 includes the same "N.A." notation, but does not have the paragraph crossed out. Government Exhibit 13 includes a notation "Dike to be maintained" in reference to an area in the SW 1/4 of the property, but Peterson's Exhibit 1 does not include the notation about maintaining the dike.

The differences between the two exhibits are not directly relevant to the issues to be decided, since the paragraph that is crossed out on Gov. Ex. 13 is not at issue, and since the wetlands which are the subject of

the charges are in the NW 1/4 rather than the SW 1/4 of section 15. Peterson asserts, however, that the differences between the two copies are indicative that changes were made after Peterson signed the map, and argues that fact supports his testimony that the wetlands at issue were not all included in the map when he signed it. This Court finds the testimony of former FWS employees was more credible that Peterson's testimony as to preparation of the 1973 map.

From 1980 until 2000, much of section 15 was not farmed, because it was enrolled in the federal waterbank program. Peterson testified that he believed drains needed to be cleaned after the land came out of the waterbank program. His disputes with FWS continued, ultimately resulting in a criminal charge filed against Peterson in 2004. In that earlier case, C2-04-102 (D.N.D. February 8, 2005, Doc. No. 29), this Court found Peterson guilty of injuring certain wetlands, including the three Section 15 wetlands which are involved in this case.

This Court sentenced Peterson to a term of probation in the earlier case, and restoration of the injured wetlands was a condition of his probation. Peterson did not comply with the restoration condition, and after three petitions and hearings addressing Peterson's failure to comply, this Court entered an Order Amending Conditions of Probation. (Gov.Ex.16). That Order authorized FWS to arrange for the wetlands restoration, and required Peterson to pay the costs of the restoration as restitution.

FWS hired a contractor to do the wetlands restoration, and that work was completed in Fall

2006. (Gov. Exs. 17, 18, 19, 20, 21, and 22). The three Section 15 wetlands involved in this case were restored by FWS's contractor in 2006. Restoration included placement of dirt "plugs" in the rims of each of the wetlands. There is no dispute that Peterson hired a contractor to remove dirt "plugs" that FWS's contractor had placed to restore the wetlands. In July 2007, Peterson's contractor, Scott Diseth, did the work Peterson had requested. The instant case charges that Peterson injured wetlands 3, 5, and 8 in Section 15 as a result of the contracted work.

Citing *Johansen,* 93 F.3d at 459, Peterson asserts that the government did not sufficiently delineate the wetlands covered by the Section 15 easement. He asserts that the language of the 1966 easement was vague, and that the easement summary does not cure the defect, because it identifies only aggregated wetlands acreage. Peterson asserts that there was no map attached to the 1966 easement, that there was insufficient proof that Wetlands 3, 5, and 8 existed in 1966, that the 1973 "renegotiated" map is of no significance because Peterson did not own the land at the time he signed the map, and that Wetlands 3, 5, and 8 were drawn on the 1973 map after Peterson signed it.

Peterson argues that the easement summary is not a sufficient identification of wetlands under the standards of *North Dakota,* 460 U.S. at 311. In *North Dakota,* a footnote states, "As the easement agreements make clear, however, the restrictions apply only to wetlands areas and not to the entire parcels." *Id.* at 311, note 14. *North Dakota* was interpreted in *Johansen,* in which the Eighth Circuit stated:

It is important to note, however, that although the Supreme Court generally accepted the federal government's argument limiting the easement restrictions to the encumbered parcels' wetlands, it did not explicitly limit the wetland easement to the Summary Acreage. The Court merely stated that '[t]he fact that the easement agreements include descriptions of much larger parcels does not change the acreage of the wetlands over which the easements have been acquired.' 93 F.3d at 465 (citing *North Dakota*).

The easement summary identifies total wetlands acreage in all seven of the subject sections of land on an aggregated basis, rather than on a parcel-by-parcel basis. In other words, the summary does not identify the wetland acreage specific to the W 1/2 of Section 15. Peterson has identified no caselaw supporting his assertion that an easement summary must identify wetlands acreage on a section-by-section basis, and this Court has found no authority supporting that position. While *North Dakota* and *Johansen* prohibit FWS from claiming an easement on more than the 314.0 total acres described in the wetlands summary, this Court does not interpret those cases as requiring parcel-by-parcel wetlands acreage.

Government Exhibit 48 is an aerial photograph of Sections 15 and 16, taken in 1962. Mike Estey, an FWS wildlife biologist specialist, testified that the wetlands depicted in Section 15 in the 1962 aerial photo were of the same approximate size, shape, and location as the wetlands drawn on the 1973 map. (Doc. No. 26, Estey testimony, at 10). Peterson

alleges that Estey was not qualified in "wetlands forecasting," and that neither the 1962 photo nor the 1973 map is sufficient to establish that Wetlands 3, 5, and 8 existed in 1966. Peterson, in effect, asserts that the government must prove that there was water standing in each of the wetlands as of the date of the easement. That position is inconsistent with the language of the easement itself, with the nature of the wetlands at issue, and with governing caselaw.

The easement prohibits "draining ... of any surface water including ... potholes, *now existing or reoccurring due to natural causes* on the [subject] tract." (Gov.Ex.1). The easement's language contemplates a natural fluctuation in actual surface water within the protected wetlands, and recognizes that wetlands may naturally reoccur. There is no doubt that Wetlands 3, 5, and 8 existed when the aerial photograph was taken in 1962.[FN2] (Gov.Ex.48). There is no doubt that all three wetlands were included in the 1973 map. (Gov. Ex. 13 and Def. Ex. 1). It is possible that, on November 10, 1966, when Peterson's parents signed the easement conveyance, not each of the three wetlands held surface water. It is also possible that not each of the three wetlands held surface water on January 16, 1967, the date the United States accepted the easement. In fact, given the time of year that both those events occurred, there may have been no surface water in any of the three wetlands on either date. That does not, however, mean that the three areas were not wetlands in existence when the easement was created.

FN2. The government asserts that Exhibit 48 is, among available aerial photographs, the one taken

closest in time to the easement purchase.

The government is not required to establish a precise legal description of each protected wetland. *United States v. Vesterso,* 828 F.2d 1234, 1242 (8th Cir.1987). "The presence of the recorded easement agreements describing wetlands in clear terms and the existence of identifiable wetlands on the parcel are sufficient proof that the United States has a property interest in the wetlands on the parcel." *Id.* The government established, by proof beyond reasonable doubt, that Wetlands 3, 5, and 8 were in existence at the time the easement was granted. There was no evidence, as there was in *Vesterso,* of wetlands expansion. Beyond a reasonable doubt, the United States met the *Johansen* and *Vesterso* requirement of proving identifiable, covered wetlands in Section 15.

Peterson did not own Section 15 at the time he signed the 1973 map, and there was no evidence he had legal authority to sign in his father's stead. His signature on the 1973 map was not, however, necessary to establish the government's easement, since Peterson's father had granted the easement in 1966. The 1973 map is relevant primarily to establish Peterson's knowledge that Wetlands 3, 5, and 8 were subject to an easement. The government established, beyond a reasonable doubt, that Peterson knew Wetlands 3, 5, and 8 were subject to an easement.

An additional basis for determining that the wetlands in Section 15 were sufficiently identified and that Peterson had knowledge of the easements

rests in the doctrine of collateral estoppel. This Court's decision in Case No. C2-04-102 included a finding that Wetlands 3, 5, and 8 had been sufficiently identified, and that Peterson had knowledge of the protected status of each of those wetlands. That decision was affirmed both by the District Judge (Doc. No. 73, C2-04-102), and by the United States Court of Appeals for the Eighth Circuit. (Doc. No. 106, C2-04-102) (No. 05-4248, 8th Cir., May 5, 2006). Although the government has not raised the doctrine of collateral estoppel, its application is supported by caselaw in this circuit. *United States v. Hernandez-Uribe,* 515 F.2d 20 (8th Cir.1975). In *Hernandez-Uribe,* the appellate court affirmed a district court's decision to apply collateral estoppel in instructing the jury that the defendant charged with illegal re-entry had earlier been found to be an alien. The earlier case had been one in which the defendant had entered a guilty plea to a charge, the essential elements of which included him being an alien.

There are differences among the federal circuit courts in application of the doctrine of collateral estoppel against a defendant in a criminal case. In *United States v. Gallardo-Mendez,* 150 F.3d 1240 (10th Cir.1998), the Court reversed a conviction in which the trial court had invoked collateral estoppel to establish that the defendant was an alien. As in *Hernandez-Uribe,* the earlier case had involved a guilty plea to a charge which included as an essential element the defendant being an alien. The *Gallardo-Mendez* court limited its holding to situations involving a prior guilty plea: "We now hold that the government may not use a judgment following a plea of guilty to collaterally estop a criminal defendant

from relitigating an issue in a subsequent criminal proceeding." *Id.* at 1246.

United States v. Pelullo, 14 F.3d 881 (3rd Cir.1994) rejected application of collateral estoppel to establish an element of a Rackeeer Influenced and Corrupt Organization Act offense by use of a defendant's earlier jury conviction for wire fraud. The *Pelullo* court based its decision on the right to a jury trial guaranteed by the Sixth and Seventh Amendments to the United States Constitution. The instant case, however, is not one in which there is a right to trial by jury. This Court has identified no caselaw addressing application of collateral estoppel when both the prior case and the case in which the doctrine is applied are cases decided by a court, rather than by a jury. This Court concludes that, pursuant to *Hernandez-Uribe,* collateral estoppel is an additional basis upon which to find that Wetlands 3, 5, and 8 were sufficiently identified, and that Peterson had knowledge of their protected status.

Section 16-156-59 (Violation Notice No. 0900742)-Easement Establishment, Identifiable Wetlands, and Peterson's Knowledge of Easement)

In October 2003, Peterson purchased a parcel of land which adjoins the West 1/2 of Section 15, namely the N 1/2 SE 1/4 of Section 16-156-59. (Gov.Ex.10). At the time he purchased the parcel in Section 16, it was subject to an easement for waterfowl management rights, which a previous owner had granted to the United States in 1968. (Gov. Exs. 7, 8, 9, and 11). The Section 16 easement includes the language quoted in the first paragraph on page 2 above, but not the language quoted in the

second paragraph. There is no doubt the United States holds a properly recorded and accepted easement on Section 16.

The government established, by proof beyond reasonable doubt, that Wetland 2 was sufficiently identified. An April 28, 2004 letter from FWS to Peterson explicitly advised him that Wetland 2 was protected. (Gov.Ex.11). Beyond a reasonable doubt, Peterson had knowledge that Wetland 2 was protected.

Sections 15 and 16-Prohibited Activity

Peterson asserts that the contractor he hired worked only outside the outer boundaries of Wetlands 3, 5, and 8. He relies on photos taken by FWS employees for that position. (Gov. Exs. 27, 28, and 29). The testimony of Peterson's contractor established, however, beyond a reasonable doubt, that the boundaries of Wetlands 3, 5, and 8 were breached at Peterson's direction.

The United States established, beyond reasonable doubt, that Peterson's contractor excavated into Wetland 2 on Section 16. In fact, Peterson's brief states, "It is undisputed that excavator Scott Diseth appears to have cleaned the waterway all the way through the wetland." (Doc. No. 119 at 21). Peterson asserts that Diseth did more excavation on Section 16 than Peterson had requested. Diseth testified that he followed starting and stopping points Peterson had showed him, that Peterson left the area while Diseth was working but later came back, and that Peterson indicated his satisfaction with the work after Diseth completed it. This Court finds the

testimony of Diseth more credible than the testimony of Peterson. Beyond a reasonable doubt, Peterson hired Diseth to perform work on Section 16 that was prohibited by the easement.

Peterson argues that FWS improperly prohibited any ditching work within 200 feet downstream from the wetlands. However, the evidence established that Peterson engaged in prohibited activity which breached boundaries of each of the wetlands. This Court therefore need not address whether FWS acted outside its authority with respect to a "200 foot rule." Nor is it necessary to address Peterson's assertion that there is a question where Wetland 2 starts and stops, since he admits the waterway was cleaned all the way through the Section 16 wetland.

Sections 15 and 16-Lack of Authority

Having established a properly recorded easement interest, identifiable wetlands, Peterson's knowledge of the wetlands easement, and Peterson's prohibited activity, the United States must next establish that the activity was not permitted or authorized. Peterson asserts his actions were permitted to clean out natural watercourses or pre-existing drainage channels. Peterson argues he acted within his rights under North Dakota law, and relies in part on a 1997 letter from the state engineer. (Def.Ex.2). That letter does not support Peterson's position; it makes only a general statement about a landowner's rights and obligations to maintain water channels, and specifically refers to a need to work with FWS to ensure that work on the land did not violate the easement. A 2006 letter from the state engineer is contrary to Peterson's interpretation of the state's

position: "It is the opinion of this office that the Court-ordered action to close the drains does not constitute blocking of a natural waterway as you have asserted." (Gov.Ex.49). There is no credible evidence that the United States granted permission for the excavation Peterson arranged. As to Section 16, in fact, that permission was specifically denied. (Gov.Ex.12). Beyond a reasonable doubt, Peterson's actions were not permitted or authorized by law.

Sections 15 and 16-Wetlands Damage

The government presented testimony of Robert Gleason, a research wildlife biologist with expertise in prairie wetlands. Gleason testified that the potential water depths of each of the four wetlands at issue had been reduced by 87% to 100% because of Peterson's contractor's work, although some still have capacity to hold "small pockets" of water.

Peterson alleges that the government did not present evidence comparing the wetlands to their condition in 1966, when the easement was established. The government met its burden to identify the wetlands, and was not required to prove the precise water levels as they existed in 1966.

The government proved, beyond any reasonable doubt, that Mr. Peterson's actions damaged each of the four wetlands. The exterior boundary of each was broken, and the ditching extended into the wetlands themselves. Wetlands damage as set forth in *Johansen* was sufficiently established.

ORDER

The government having established, by proof beyond a reasonable doubt, each of the six essential elements as to each of the charges, this Court finds Alvin Peterson guilty of the two crimes charged in the Violation Notices. The USPPSO is directed to complete a pre-sentence investigation, with sentencing to be scheduled after completion of that investigation.

APPENDIX D

16 U.S.C. § 668dd(c) Prohibited and permitted activities; application of mining and mineral leasing laws, hunting or fishing regulations, and State laws or regulations

No person shall disturb, injure, cut, burn, remove, destroy, or possess any real or personal property of the United States, including natural growth, in any area of the System; or take or possess any fish, bird, mammal, or other wild vertebrate or invertebrate animals or part or nest or egg thereof within any such area; or enter, use, or otherwise occupy any such area for any purpose; unless such activities are performed by persons authorized to manage such area, or unless such activities are permitted either under subsection (d) of this section or by express provision of the law, proclamation, Executive order, or public land order establishing the area, or amendment thereof: *Provided,* That the United States mining and mineral leasing laws shall continue to apply to any lands within the System to the same extent they apply prior to October 15, 1966, unless subsequently withdrawn under other authority of law. With the exception of endangered species and threatened species listed by the Secretary pursuant to section 1533 of this title in States wherein a cooperative agreement does not exist pursuant to section 1535(c) of this title, nothing in this Act shall be construed to authorize the Secretary to control or regulate hunting or fishing of resident fish and wildlife on lands not within the system. The regulations permitting hunting and fishing of resident fish and wildlife within the

System shall be, to the extent practicable, consistent with State fish and wildlife laws and regulations.

16 U.S.C. § 668dd(f) Penalties

(1) Knowing violations

Any person who knowingly violates or fails to comply with any of the provisions of this Act or any regulations issued thereunder shall be fined under Title 18 or imprisoned for not more than 1 year, or both.

(2) Other violations

Any person who otherwise violates or fails to comply with any of the provisions of this Act (including a regulation issued under this Act) shall be fined under Title 18 or imprisoned not more than 180 days, or both.

APPENDIX E

UNITED STATES DEPARTMENT OF THE INTERIOR
U.S. FISH AND WILDLIFE SERVICE
BUREAU OF SPORT FISHERIES AND WILDLIFE

CONVEYANCE OF EASEMENT FOR WATERFOWL MANAGEMENT RIGHTS 1248, 1- 3

Joe C. Peterson A/L/A Joe Peterson A/X/A and Emma Peterson, his wife, of Adams, North Dakota parties of the first part, and the UNITED STATES OF AMERICA, acting by and through the Secretary of the Interior or his authorized representative, party of the second part.

WITNESSETH:

WHEREAS, section 4 of the Migratory Bird Hunting Stamp Act of March 16, 1934, as amended by section 3 of the Act of August 1, 1958 (72 Stat. 486, 16 U.S.C., 718d (c)), authorizes the Secretary of the Interior to acquire small wetland or pothole areas suitable for use as waterfowl production areas:

WHEREAS, the lands described below contain or include small wetland or pothole areas suitable for use as waterfowl production areas:

NOW, THEREFORE, for and in consideration of the sum of Forty Seven Hundred Dollars ($4700.00), the parties of the first part hereby convey to the United States, commencing with the acceptance of this indenture by the Secretary of the Interior or his authorized representative which acceptance must be made within six months of the execution of this indenture by the parties of the first part; or any subsequent date as may be mutually agreed upon during the term of this option, an easement or right of use

for the maintenance of the land described below as a waterfowl production area in perpetuity, including the right of access thereto by authorized representatives of the United States:

Walsh County, North Dakota
T. 156 N., R. 59 W., 5th P.M.
section 5, S½
section 15, W½
section 16, NE¼, S½SE¼
section 17, SW¼
section 18, SE¼
section 19, fractional NW¼
section 20, NW¼

Subject, however, to all existing rights-of-way for highways, roads, railroads, pipelines, canals, laterals, electrical transmission lines, telegraph and telephone lines, and all outstanding mineral rights.

The parties of the first part, for themselves and for their heirs, successors and assigns, covenant and agree that they will cooperate in the maintenance of the aforesaid lands as a waterfowl production area by not draining or permitting the draining, through the transfer of appurtenant water rights or otherwise, of any surface water including lakes, ponds, marshes, sloughs, swales, swamps, or potholes, now existing or reoccurring due to natural causes on the above-described tract, by ditching or any other means; by not filling in with earth or any other material or leveling, any part or portion of the above-described tract on which surface water or marsh vegetation is now existing or hereafter reoccurs due to natural causes; and by not burning any areas covered with marsh vegetation. It is understood and agreed that this indenture imposes no other obligations or restrictions upon the parties of the first part

and that neither they nor their successors, assigns, lessees, or any other person or party claiming under them shall in any way be restricted from carrying on farming practices such as grazing, hay cutting, plowing, working and cropping wetlands when the same are dry of natural causes, and that they may utilize all of the subject lands in the customary manner except for the draining, filling, leveling, and burning provisions mentioned above. Excepted are certain drainage ditches which the parties of the first part may maintain and/or wetlands which are deleted from the provisions of this easement. The above exceptions are shown on a map certified by the Regional Director at the time of acceptance.

SPECIAL PROVISION

1. This indenture shall not be binding upon the UNITED STATES OF AMERICA until accepted on behalf of the United States by the Secretary of the Interior or his authorized representative, although this indenture is acknowledged by the parties of the first part to be presently binding upon the parties of the first part and to remain so until the expiration of said period for acceptance, as hereinabove described, by virtue of the payment to parties of the first part, by the UNITED STATES OF AMERICA, of the sum of One Dollar, the receipt of which is hereby expressly acknowledged by parties of the first part.

2. Notice of acceptance of this agreement shall be given the parties of the first part by certified mail address to Joseph Peterson at Adams, North Dakota, and such notice shall be binding upon all the parties of the first part without sending a separate notice to each.

3. The parties of the first part warrant that no person or selling agency has been employed or retained to solicit or secure this contract upon agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the vendors for the purpose of securing business. For breach or violation of this warranty the United States shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

4. It is further mutually agreed that no Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract, or to any benefit to arise thereupon. Nothing, however, herein contained shall be construed to extend to any incorporated company, where such contract is made for the general benefit of such incorporation or company.

5. Payment of the consideration will be made by Disbursing Officers check after acceptance of this indenture by the Secretary of the Interior or his authorized representative, and after the Attorney General or in appropriate cases, the Field Solicitor of the Department of the Interior shall have approved the easement interest thus vested in the United States.

IN WITNESS WHEREOF the parties of the first part have hereunto set their hands and seals this 10 day of November, 1966.

_____

Joseph C. Peterson

_____

Emma Peterson

APPENDIX F

UNITED STATES DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE
BUREAU OF SPORT FISHERIES AND WILDLIFE

Easement Summary

State:	North Dakota
County:	Walsh
Location:	T. 156 N., R. 59 W., 5th P.M. section 5, S½ section 15, W½ section 16, NE¼, S½SE¼ section 17, SW¼ section 18, SE¼ section 19, fractional NW¼ section 20, NW¼

Tract Name:	Peterson, Joseph G.
Trace Number:	124X, 1 – 3
Easement Dated:	11-10-66
Easement Option Expires:	5-9-67
Easement Accepted:	JAN. 18, 1967
Term of Easement:	Perpetual
Easement Consideration:	$4700.00
Tract Acreage:	1510.49

Cost per acre:	$3.11
Wetlands Acreage:	314.00
Wetlands cost per acre:	$14.96
Estimate of Value:	$4700.00
Accounting Number	14-16-0003-17763

Authorization to acquire easements in Walsh County, North Dakota, given by Governor William Guy in letter dated 3-8-63.

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